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No. 99-1038

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IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORPORATION,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA, DISTRICT 17;
LOCAL 1503, UNITED MINE WORKERS OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

We began our opening brief by explaining that there is a well-established rule that courts will not enforce a contract contrary to public policy, and that this rule applies to collective bargaining agreements and arbitration awards entered pursuant to them. *See* Pet. Br. 11-27. Neither the Union nor the Solicitor General takes issue with either showing. We went on to demonstrate that there is a well-defined and dominant public policy against illegal drug use by those in certain safety-sensitive positions, grounded in part in the Testing Act and DOT regulations. *See id.* at 29-38. Once again, neither the Union nor the Solicitor General challenges that showing.

Instead, both the Union and the Solicitor General put all their eggs in one basket: the contention that the public policy exception is limited in this case, so that courts asked to enforce arbitration awards reinstating confirmed drug users to safety-sensitive positions may only check for compliance with the minimum requirements of the DOT regulations. The upshot of this position is, of course, that there is no public policy exception at all in such cases—arbitration awards that violate the DOT regulations are unenforceable on that ground, not because of the public policy exception. Neither the Union nor the Solicitor General, however, has carried the burden of justifying such a departure from the time-tested rule.

INTRODUCTION AND SUMMARY

The Union and the Solicitor General labor mightily in their submissions to establish what turns out to be merely the predicate for the question presented—namely, that the Testing Act and DOT regulations "leav[e] to private ordering" the decision whether a commercial driver who tests positive for illegal drugs should be reinstated to his safety-sensitive position. SG Br. 15; UMWA Br. 14. Since the earliest days of the common law, however, whenever private ordering has taken the form of a contractual agreement, and the courts have been asked to enforce that agreement, the courts have had the authority to decline to do so on the ground that the agreement contravenes public policy. That is so because "the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 42 (1987).

What neither the Union nor the Solicitor General even attempts to explain is why that principle "of universal application," *Trist* v. *Child*, 88 U.S. 441, 448 (1874), is somehow inapplicable to this particular realm of private ordering. Certainly nothing in the Testing Act or DOT regulations remotely suggests that in leaving the question of reinstatement to be decided by contract, Congress or the Executive meant to repeal the established common law rules—including the public policy exception—that govern all other contractual arrangements. The very fact that the regulations accord such a prominent role to private contract makes it particularly important that the "safety valve" of the public policy exception remain available, so that when courts are called upon to enforce reinstatement awards they do not lend their authority to awards posing a serious threat to public safety.

The argument of the Union and the Solicitor General reduces to nothing more than the minority position on the question reserved in *Misco*, 484 U.S. at 45 n.12—that courts applying the public policy exception to arbitration awards should be restricted to asking whether the award itself is illegal or requires unlawful conduct. According to the Union and the Solicitor General, the Act and regulations adopt an "anything goes" approach with respect to reinstating drug users to safety-sensitive positions, once the minimum requirements in the regulations have been met. Under their approach, *nothing* the parties may agree to (or which an arbitrator may award) can possibly be contrary to the acknowledged public policy against illegal drug use by those occupying safety-sensitive jobs, and the courts must enforce *any* agreement (or arbitration award) without regard to its impact on third parties, public safety, or the testing program mandated by the Act. As we explained in our opening brief, however, the public policy exception has never been limited

to illegal agreements or arbitration awards that are themselves illegal. *See* Pet. Br. 14-19 (citing cases, Restatement, and commentators). Such a restriction would do away with the exception altogether.

Nor, contrary to the Union's contention, is there any basis for concluding that the public policy exception should not apply with its ordinary scope to collective bargaining agreements or arbitration awards entered pursuant to them. The normal rule of deference to arbitrators does not apply when the issue is the rights and interests of third parties who have not agreed to arbitration, and the question to be decided is one of public policy rather than the interpretation of a collective bargaining agreement. In any event, courts applying the public policy exception do not second-guess the arbitrator's factual findings, but only ask whether in light of the facts as found enforcement of the award would violate public policy. That question "is ultimately one for resolution by the courts." *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of Rubberworkers*, 461 U.S. 757, 766 (1983).

For hundreds of years, courts asked to enforce private agreements have understood themselves to be authorized —indeed, duty-bound—to pause and consider whether enforcement would violate public policy by, for example, threatening the well-being of third parties not privy to the agreement. What would be "radical" (SG Br. 30) is to accept the Union's and the Solicitor General's invitation to turn a blind eye to the direct threat to public safety posed by enforcement of this award, and to conclude that such awards are immune from the public policy exception applicable as a matter of course to all other contracts.

ARGUMENT

I. THE FACT THAT THE DOT REGULATIONS LEAVE TO PRIVATE CONTRACT THE DECISION WHETHER AN EMPLOYEE IN A SAFETY-SENSITIVE POSITION WHO TESTS POSITIVE FOR ILLEGAL DRUG USE SHALL BE REINSTATED SIMPLY POSES—DOES NOT ANSWER—THE QUESTION PRESENTED.

The Union and the Government contend that the courts are powerless to consider whether an arbitration award ordering a reinstatement not prohibited by the regulations may violate public policy. This is so, we are told, because the regulations *permit* reinstatement in certain circumstances—specified in 49 C.F.R. § 382.605—and leave the question of reinstatement "with the employer * * *, subject to any constraints on management discretion * * * that the employer has voluntarily assumed." SG Br. 13. *See* UMWA Br. 22-23. But while the regulations applicable here certainly establish the *minimum* process that must be followed prior to any reinstatement, there has been no showing that this minimum has "entirely occupied the field" to the exclusion of the public policy doctrine. Restatement (Second) of Contracts § 179, comment b (1981). The minimum requirements expressly do not occupy the field to the exclusion of private agreements; there is no reason to suppose they do so to the exclusion of an established common law doctrine that goes hand in hand with all such agreements.[1]

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[1] The Union seeks to advance its argument by suggesting that the public policy on which we rely is drawn only from the Testing Act and the DOT regulations. *See* UMWA Br. 9. In fact, as we explained, the well-defined and dominant public policy against illegal drug use by those in safety-sensitive positions is grounded in " 'a solid phalanx of positive law,' " including but not limited to the Testing Act and the regulations issued under it. Pet. Br. 31

On the contrary, the very most that the Union and the Government can offer is that the Testing Act and DOT regulations generally leave the question of reinstatement to "private ordering"—except where the employee fails to go through the evaluation and rehabilitation process and reinstatement is therefore barred. We agree. When it promulgated the pertinent regulations, the Federal Highway Administration made clear that compliance with that process "will not guarantee a right of reemployment," and that the employer could impose additional consequences "based on the employer's authority *independent of these rules*," so long as such "additional policies [are] clearly identified as based on the *employer's independent authority*." 59 Fed. Reg. 7484, 7502-03 (Feb. 15, 1994) (emphases added). There is no reason to conclude, however, that such independent authority is not subject to generally applicable legal principles—including, where contractual arrangements are at issue, the doctrine that courts will not enforce contracts contrary to public policy.[2]

(quoting *Exxon Corp.* v. *Esso Workers' Union, Inc.*, 118 F.3d 841, 849 (1st Cir. 1997)). *See* Pet. Br. 30-38 (reviewing statutes, regulations, and precedents). The Testing Act and the regulations are "designed to promote the public policy against performance of safety-sensitive tasks by persons who use drugs," *Esso Workers' Union*, 118 F.3d at 848, but do not purport to and do not exhaust the bounds of that policy.

[2] The Solicitor General misses the point in viewing our argument as being "that if employers are permitted to impose sanctions for drug use above and beyond those mandated by the regulations, then federal courts must be free to do so as well." SG Br. 19 (citing Pet. Br. 46-47). What we actually said was quite different: "While employers and employees * * * remain free to agree by contract on both the process for addressing violations of the drug policy and on sanctions for those violations, any such agree-

There are, to be sure, references in the regulatory record indicating that an employer's independent authority to impose additional consequences for failed drug tests will sometimes be constrained by collective bargaining. *See*, *e.g.*, 59 Fed. Reg. at 7332. But nowhere is there the slightest hint that the results of such bargaining are somehow sacrosanct, elevated to a position above that occupied by all other contracts, even in the age of *Lochner*, *see* Pet. Br. 13 n.4, such that the public policy doctrine does not apply. Indeed, this Court has already determined that "[a]s with any contract, * * * a court may not enforce a collective-bargaining agreement that is contrary to public policy." *W.R. Grace*, 461 U.S. at 766. Nothing in the administrative record of the DOT regulations purports to displace this settled rule.[3]

Not only does the administrative record fail to provide any support for the view of the Union and the Solicitor General that the regulations somehow displace the centuries-old public policy doctrine, but such a conclusion would defy

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ment—like all other contractual arrangements—remains subject to the public policy doctrine, applied by the courts. Nothing in the Act or regulations suggests otherwise." Pet. Br. 47. The Solicitor General has no response to *that* contention.

[3] The Academy of Arbitrators argues that the public policy exception should not preclude judicial enforcement of any arbitration award ordering action that an employer could take on its own. *See* Academy Br. 4. This standard ignores the fact that the public policy exception is a doctrine of contract law and is implicated only when the courts are called upon to enforce a contract. *See* Pet. Br. 12-13. It is not a free-standing cause of action applicable to unilateral conduct. The employer's unilateral conduct in this regard is, in any event, constrained by the same considerations that inform the public policy exception, expressed in potential tort liability for the conduct of a reinstated driver. *See* Pet. App. 9a-10a; Brief Amicus Curiae of ExxonMobil Corporation 7.

common sense. As we have explained, the public policy doctrine has always been applied with an eye toward public safety. *See* Pet. Br. 30 n.15. It would be particularly odd to conclude that the doctrine has been displaced—*sub silentio*, no less—in a context where public safety is so directly implicated and was the very reason for the Testing Act in the first place. *See* SG Br. 2-3. And it would be even odder to conclude that the doctrine was displaced solely by a decision to leave the issue to private contract—a decision that typically would trigger, not preclude, application of this common law contract doctrine. If the reinstatement question is to be left to "private ordering," it is especially important that the public policy doctrine remain in place as a safety valve to protect those interests not otherwise accounted for yet directly affected by the reinstatement decision. *See Misco*, 484 U.S. at 42.

That the DOT regulations do not occupy the field to the exclusion of the public policy exception is true both as a general matter and in the particular case of repeat offenders. While the Union and the Solicitor General suggest that the failure to adopt a proposed regulation which would have imposed a period of suspension for second-time offenders somehow displaces the public policy doctrine on the reinstatement question, *see* UMWA Br. 18-19; SG Br. 5, 10, 20-21, there is no basis for attributing such an effect to DOT's *failure* to act. Indeed, the decision not to adopt the suspension proposal is wholly unexplained in the administrative record. *See* 59 Fed. Reg. at 7493 (simply noting that "[t]he FHWA has not included any CDL suspensions or other disqualifications [in] the final rule"). The failure to adopt a one-size-fits-all rule applicable in every case of a recidivist offender, along with the decision to leave the issue of reinstatement to private contract, hardly evinces an unstated intent to bar application of the public policy doctrine, a doc-

trine applicable as a matter of course to all contracts on a case-by-case basis as a safety valve to guard against egregious outcomes from the private ordering process. *See* Pet. Br. 39 n.25, 47.[4]

The Solicitor General's representation that DOT decided to entrust decisions regarding repeat offenders to "the sound judgment of arbitrators," SG Br. 10, is fanciful at best; the administrative record contains no mention of arbitrators. Furthermore, as explained below, labor arbitrators lack both the expertise and the authority to apply public policy. *See infra* at 15-16.

Nor can public safety reasonably be left in the hands of the substance abuse professional ("SAP") selected to counsel a

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[4] The Solicitor General suggests that because DOT regulations disqualify for 60 days a driver twice convicted of a serious traffic violation within a three-year period, courts have no choice but to enforce an award reinstating a driver who tests positive for illegal drugs twice within 14 months. *See* SG Br. 21-22 n.10. This apples-and-oranges comparison ignores a number of considerations, including that a recidivist drug offender has already been through a rehabilitation program, which proved unsuccessful in preventing renewed use, and that reinstatement in such circumstances seriously undermines the deterrent effect of the testing program. *See* Pet. Br. 40-44. In addition, it is important to recognize that the position of the Solicitor General and the Union is that courts must enforce awards reinstating drivers who test positive a second, fifth, or even twentieth time, and that in *no case* may a court decline to do so on public policy grounds. If the Court agrees with us that this extreme position is untenable, the only remaining question is the proper application of the public policy exception on the particular facts of this case. The Union and the Solicitor General have not rebutted our showing in that regard (Pet. Br. 38-44), having chosen instead to rest on the contention that courts may not undertake the public policy inquiry at all.

driver who tests positive. First, nothing in the regulations mandates that a SAP consider public safety in creating a rehabilitation program. *See* 49 C.F.R. § 382.605(b). Second, the SAP's professional obligations run to the driver, not the public; what may be best for the driver may not be best from the point of view of public safety. *See* National Ass'n of Alcoholism & Drug Abuse Counselors, Ethical Standards of Alcoholism & Drug Abuse Counselors, Principle 7(c) (1995) ("The NAADAC member shall hold the welfare of the client paramount when making any decisions or recommendations concerning referral, treatment procedures or termination of treatment."). Finally, the SAP must simply confirm that the driver "has properly followed any [prescribed] rehabilitation program"—not that the program was (or was likely to be) successful, that the driver is unlikely to use drugs again, or even that it is safe for him to return to a position in which such use might imperil others. 49 C.F.R. § 382.605(c)(2)(i). Such a minimal certification is little comfort from the perspective of public safety in a case such as this, when one thing known for certain is that "properly follow[ing]" a prior rehabilitation program did not work. *See* Brief Amicus Curiae of the Institute for a Drug-Free Workplace 18 ("those with a history of substance abuse pose a *much* greater risk of relapse and its attendant risks than those without such a history") (emphasis in original).

In sum, in arguing at length that the issue of reinstatement is largely unaddressed by the Testing Act and its regulations but is instead left to private ordering, the Union and the Solicitor General do no more than set up the question presented in this case—under what circumstances may courts refuse to enforce private contractual arrangements, including, as here, collective bargaining agreements and the results of arbitration under those agreements—on the ground that they are "contrary to public policy."

II. THE POSITION OF THE UNION AND THE SOLICITOR GENERAL THAT THE REINSTATEMENT AWARD MUST BE ENFORCED SIMPLY BECAUSE IT IS NOT ILLEGAL IS CONTRARY TO THE ESTABLISHED UNDERSTANDING OF THE PUBLIC POLICY DOCTRINE.

Neither the Union nor the Solicitor General, then, show any intent in the Act or regulations to displace the public policy exception generally applicable whenever courts are asked to enforce private agreements; the most they show is that the regulations do not prohibit the reinstatement order at issue here. In other words, the Union and the Solicitor General have simply adopted the narrower of the two possible answers to the question left open in *Misco*: whether "a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." 484 U.S. at 45 n.12. The Union explicitly takes this position (UMWA Br. 27), while the Solicitor General does so implicitly.

As shown in our opening brief, this Court's cases have not limited the public policy doctrine to violations of positive law. *See* Pet. Br. 14-16. Indeed, in both *W.R. Grace*, 461 U.S. at 766, and *Misco*, 484 U.S. at 42, this Court prominently cited with approval *Hurd* v. *Hodge*, 334 U.S. 24 (1948), in which the Court refused to enforce a restrictive covenant that violated no constitutional or statutory provision but clearly did violate public policy. *See also Town of Newton* v. *Rumery*, 480 U.S. 386, 392-396 (1987) (considering whether release-dismissal agreements violate public policy even though 42 U.S.C. § 1983 is silent on the issue).

And even well before such modern cases, the Court had squarely rejected the notion that a contractual provision cannot be held contrary to public policy where "there is no

statute expressly prohibiting such contracts." *The Kensington*, 183 U.S. 263, 270 (1902). Thus, the longstanding rule has been that a court "will not lend its aid to enforce a contract to do an act that is illegal; *or* which is inconsistent with * * * public policy." *Marshall* v. *Baltimore & Ohio R.R.*, 57 U.S. 314, 334 (1853) (emphasis added).[5] The Restatement and leading commentators agree. *See* Pet. Br. 16-17. Tellingly, neither the Union nor the Solicitor General even attempts to respond to our showing on this point.

Their position would leave no room for cases like *Local No. P-1236* v. *Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982). There, a meat processor adopted a rule prohibiting its employees from reporting unsanitary conditions directly to Department of Agriculture inspectors rather than to company management. An arbitrator upheld the rule, but the Seventh Circuit accepted the union's argument that the rule violated "clearly defined" public policy, *id.* at 1145, citing the overarching purposes of the Meat Inspection Act, even though no specific provision of the Act made the rule illegal.[6]

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[5] *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982), cited by the Union (UMWA Br. 30), is not to the contrary. That case involved a claim that a provision of a collective bargaining agreement violated the Labor Management Relations Act ("LMRA") itself, not public policy, and, in any event, the Court recognized that such provisions "are entitled to * * * respect" only so long as they "do not violate federal law *or policy*." 455 U.S. at 575 (emphasis added).

[6] The Academy attempts to distinguish *Jones Dairy Farm* on the ground that the issue there was not "the arbitrator's decision on the 'just cause' of an employer's discipline" but rather the validity of "a contract rule" (Academy Br. 11), but that is not a principled basis for distinction. Indeed, as the Academy itself points out, when an arbitrator resolves a labor-management dispute pursuant to a written agreement calling for arbitration, "it is just as if the

If the *Misco* question were answered as the Union would have it, there would no longer be a public policy doctrine. Instead, the role of courts would be reduced to asking whether an arbitration award violates an express statutory or regulatory provision. A court would be obligated to lend its imprimatur to an arbitrator's decision and enforce the award no matter how egregious a threat to public safety the award may pose.

That is not and should not be the law. Because the courts below thought otherwise, this Court should at the least remand the case to afford the lower courts the opportunity to apply the public policy doctrine as correctly understood. *See* Pet. Br. 28.

III. APPLYING THE PUBLIC POLICY EXCEPTION TO ARBITRAL AWARDS IS FULLY CONSISTENT WITH FEDERAL LABOR LAW.

The Union insists that for a court to do more than ask whether an arbitration award is illegal would be inconsistent with federal labor law. *See* UMWA Br. 26-31. In this, the Union is quite wrong.

As an initial matter, the Union misconceives the source of the public policy doctrine. The Union suggests the doctrine comes from Section 301 of the LMRA, and thus calls it "the LMRA § 301 public policy exception." UMWA Br. 27. In fact, however, the source of the public policy doctrine is the common law of contracts. As the *Misco* Court explained: "A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy *is a specific application of the more general*

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employer and the union had stipulated in so many words that this was the prescribed remedy under the circumstances." *Id.* at 9. The outcome of the arbitration is the "contract rule."

doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." 484 U.S. at 42 (emphasis added). And in *W.R. Grace*, the Court said that "*[a]s with any contract*, * * * a court may not enforce a collective-bargaining agreement that is contrary to public policy." 461 U.S. at 766 (emphasis added). Both of the quoted statements, moreover, were followed by a citation to *Hurd* v. *Hodge*, *supra*, which involved neither labor law nor arbitration. Thus, the public policy doctrine is properly understood as a common law rule applicable to all contracts, including collective bargaining agreements.[7]

Contrary to the Union's contention, judicial review of labor arbitration awards for violations of public policy is not inconsistent with federal labor law. We agree that the labor laws require a court to refrain from second-guessing the

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[7] The Union distorts statements in *Bowen* v. *United States Postal Service*, 459 U.S. 212 (1983), and *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), in arguing that such common law doctrines do not apply to suits under Section 301. In *Lucas Flour*, the Court said that "incompatible doctrines of *local* law must give way to principles of federal labor law," *id.* at 102 (emphasis added), not, as the Union says, "incompatible doctrines of [common] law." UMWA Br. 28 n.16 (brackets by the Union). *Lucas Flour* thus merely stands for the unremarkable proposition that federal labor law preempts inconsistent state law. And *Bowen* did not say that the Court has "not appl[ied] principles of ordinary contract law" in Section 301 cases generally (UMWA Br. 28), but rather that "*Vaca* [v. *Sipes*, 386 U.S. 171 (1967)] did not apply principles of ordinary contract law" to the question of "apportionment of damages caused by the employer's breach of the collective-bargaining agreement and the union's breach of its duty of fair representation." *Bowen*, 459 U.S. at 224. The fact that the *Vaca* Court elected not to apply contract law to that very specific labor law issue hardly establishes that the common law of contracts is to be routinely ignored in Section 301 cases.

decision of a labor arbitrator in the ordinary case, *see* Pet. Br. 24, but the grounds for such judicial deference are lacking in a case like this—for three reasons.

First, it is one thing for a court to defer to the decision of an arbitrator where all the parties whose interests are at stake have consented to the arbitration process. But it is quite another for a court to defer to an arbitral decision that affects third parties who never consented to be subject to an arbitrator's unreviewable decree. *See id.* at 24-25. The LMRA identifies arbitration as the preferred means of resolving disputes *between contracting parties who consent to the process*. *See* 29 U.S.C. § 173(d) ("Final adjustment by a method *agreed upon by the parties* is declared to be the desirable method for settlement of grievance disputes") (emphasis added). Those who have not consented to arbitration—here, the traveling public—cannot be bound by an arbitrator's determination. *See United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit").[8]

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[8] *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368 (1974), heavily relied on by the Union (UMWA Br. 34-35) and the Academy (Academy Br. 10), is readily distinguishable. The Union quotes *Gateway Coal* for the proposition that labor policies favoring arbitration " 'are as applicable to labor disputes touching . . . safety . . . as to other varieties of disagreement.' " UMWA Br. 34 (ellipses by the Union). Filling in the ellipses, what the Court actually referred to was "labor disputes touching the safety *of the employees*," 414 U.S. at 379 (emphasis added), not the safety of the public at large. The issue in *Gateway Coal* was thus "the workers' interest in their own safety," *id.*, which presumably can be left to the agreement of the parties or an arbitrator selected by them. The question here is public safety—the impact on those not

Second, one of the reasons courts defer to labor arbitrators is the latter's presumed expertise in "the law of the shop." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). But arbitrators have no comparable expertise in "the law of the land." *Id. See also Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 78 (1998) (presumption of arbitrability "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*") (emphasis in original). Arbitrators are not experts in determining whether a properly interpreted collective bargaining agreement is consistent with public policy, which is an issue "ultimately * * * for resolution by the courts." *W.R. Grace*, 461 U.S. at 766. *See* Pet. Br. 25.

Third, even if arbitrators were competent to factor public policy into their decisions, labor law does not authorize them to do so. The role of a labor arbitrator is to interpret and apply the collective bargaining agreement between the parties to the arbitration, and he may not base his decision on factors outside the four corners of that agreement. *See id.* at 25-26. Public safety is notably absent from the Solicitor General's list of factors an arbitrator should consider in a case such as this, *see* SG Br. 26, and the arbitrator's award in this case evinces no consideration of public safety in ordering reinstatement. *See* Pet. App. 28a ("If the arbitrator was misled by the grievant, the arbitrator is confident that the grievant will make another misstep with drug use and be caught."). The LMRA itself recognizes that arbitration is confined to the resolution of disputes "over the *application or interpretation* of an existing collective-bargaining agreement." 29

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parties to the collective bargaining agreement—who have in no way agreed to abide by an arbitrator's decision affecting their safety.

U.S.C. § 173(d) (emphasis added). The public policy question begins, not ends, with such an application or interpretation.

Although the current Solicitor General is willing to leave the question in the hands of an arbitrator, "notwithstanding the fact that the consequences * * * may be felt beyond the employer's place of business," SG Br. 26, the Office has previously explained—when it was urging this Court to vacate an arbitrator's award ordering reinstatement of a postal worker fired for failing to deliver the mail—that "arbitrators are not competent to make the final judgment concerning the degree of risk that the public may legally be forced to assume" and that "external authorities such as courts must retain the final say in order to ensure that overriding public interests are properly vindicated." Reply Brief for the United States, *United States Postal Serv.* v. *National Ass'n of Letter Carriers*, No. 87-59, at 14, 15.

This Court's decision in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), strongly supports our analysis. In considering the extent to which collective bargaining agreements preempt state law, the Court noted that

> Section 301 on its face says nothing about the substance of what private parties may agree to in a labor contract. Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. [*Id.* at 211-212 (footnote omitted).]

The Court therefore held that labor agreements may preempt only those "state-law rights and obligations that *do not exist independently of private agreements*, and that as a result *can be waived or altered by agreement of private parties*." *Id.* at 213 (emphasis added). *See also id.* at 213 n.8 (distinguishing "rights which could be waived by contract between the parties, on the one hand, from an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement, on the other"); *Livadas* v. *Bradshaw*, 512 U.S. 107, 123 (1994) (Section 301 does not preempt "nonnegotiable rights conferred on individual employees as a matter of state law") (citing *Lueck*).

The common law public policy doctrine is such "an independent body of law" that cannot be "waived or altered" by private agreement. Obviously, parties cannot contract around a doctrine the very point of which is to limit that for which parties can contract. And if labor and management cannot "contract for what is illegal under state law," they cannot contract for that which violates clearly defined public policy derived from federal law and regulations.

The Solicitor General depicts our position as being that the District Court in this case should have exercised "de novo review" over the arbitrator's decision, and "should have either made its own credibility determination * * *, or conducted a new evidentiary hearing." SG Br. 29, 27. Not so. Courts have been applying the public policy exception to arbitration awards for many years, and they have recognized that the issue is resolved "by taking the facts as found by the arbitrator, but reviewing his conclusions de novo." *Iowa Elec. Light & Power Co.* v. *Local Union 204, IBEW*, 834 F.2d 1424, 1427 (8th Cir. 1987). *See Gulf Coast Indus. Workers Union* v. *Exxon Co., U.S.A.*, 991 F.2d 244, 249 (5th Cir.) (same), *cert. denied*, 510 U.S. 965 (1993); *E.I. DuPont de Nemours & Co.* v. *Grasselli Employees Indep. Ass'n*, 790

F.2d 611, 616 (7th Cir.) (courts applying public policy exception "correctly refused to defer to the arbitrator's conceptions of public policy, [but] they continued to respect his findings of fact"), *cert. denied*, 479 U.S. 853 (1986). Here, there was no need for the District Court to second-guess any of the arbitrator's findings, because the arbitrator made *no* finding to the effect that Smith is likely to be successfully rehabilitated or is unlikely to use drugs again in the future. *See* Pet. Br. 42-43.

Both the Union (UMWA Br. 28-34) and the Solicitor General (SG Br. 24-30) issue dire warnings about the consequence to labor arbitration of applying the public policy exception, even though the exception has been a comfortable corollary to the development of contract law over the centuries and has not given rise to an era of industrial strife in those circuits that have adopted our position. When the shoe was on the other foot, the Office of the Solicitor General recognized that organized labor "cries 'wolf' in suggesting that empowering federal courts to make these judgments will lead to the destruction of the private arbitration system," in part because "courts have long been judging under the authority of other laws—such as the antitrust laws and the labor laws—whether particular terms of collective bargaining agreements (and arbitration awards implementing them) create legally unacceptable risks of future harm to well-defined and dominant public policies." Reply Brief for the United States, *United States Postal Serv.* v. *National Ass'n of Letter Carriers*, No. 87-59, at 15, 16.

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For centuries courts have refused to enforce not only illegal contracts, but also those that do violence to public policy. Courts have done so both to protect third parties who may be harmed by private compacts in which they had no say and to

protect themselves from becoming accomplices in the public policy violation. The proper test is not, of course, the court's subjective sensibilities, but whether there is a clearly established policy firmly rooted in law, rule, and precedent. Here, there is such a policy, and it is violated by an agreement that requires a court to return a repeat drug user, as to whom deterrence and rehabilitation have already failed, to a job in which a further lapse on his part may claim the lives of innocent motorists.

CONCLUSION

For the foregoing reasons, and those in petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

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